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No. 79-197

In the Supreme Court of the United States

OCTOBER TERM, 1978

STAN SKOKO, ET AL., PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-32) is not reported. The district court's judgment (Pet. App. 34) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1979 (Pet. App. 23). A petition for

rehearing was denied on May 1, 1979 (Pet. App. 33). The petition for a writ of certiorari was filed on July 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain counties in Oregon containing grant lands of the Oregon & California Railroad revested in the United States are entitled to 75 percent of the annual revenues from such lands.

STATEMENT

In 1866 Congress granted approximately 4,000,000 acres of public land (the "O&C grant lands") to the Oregon & California Railroad to aid construction of a railroad from Portland, Oregon, to the California border.[1] The granting legislation, as amended in 1869, contained a homestead proviso requiring the railroad company to sell the grant lands not used for railroad purposes "to actual settlers" in tracts not larger than a quarter section (160 acres) and at a price not exceeding $2.50 per acre. Although the railroad eventually built the line, it repeatedly violated the homestead proviso.

As a result of these violations, Congress directed the Attorney General to bring suit against the railroad to enforce the rights of the United States. 35

[1] Act of July 25, 1866, ch. 242, 14 Stat. 239, as amended by the Act of April 10, 1869, ch. 27, 16 Stat. 47. Additional provisions and grants appear in the Acts of June 25, 1868, ch. 80, 15 Stat. 80, and May 4, 1870, ch. 69, 16 Stat. 94.

Stat. 571. In 1915 this Court held that the railroad's violation of the homestead proviso did not justify forfeiture without compensation, and that Congress should devise a remedy "within a reasonable time" to "secure" to the railroad "all the value" that the granting acts had conferred. *Oregon & C.R.R.* v. *United States*, 238 U.S. 393, 438-439 (1915).

In response, Congress passed the Chamberlain-Ferris Revestment Act of June 9, 1916, ch. 137, 39 Stat. 218, 219, which declared that all undisposed O&C grant lands were thereby "revested in the United States" and set forth procedures to secure to the railroad the "full value" of the grant.[2] The Revestment Act also established a special account in the United States Treasury (the "O&C fund") for all revenues derived from the revested O&C grant lands. From this fund the railroad was to receive the amount due to it; thereafter the United States was to be reimbursed for its payments made to 18 Oregon counties containing O&C grant lands ("O&C counties") for taxes on the lands delinquent up to the date of revestment. Once this was done, the Revestment Act directed that distribution of the O&C fund revenues be made four ways every fiscal year: 25 percent to the

[2] Subsequently, this Court held that the Act constituted the "execution" of its previous judgment and rejected the railroad's challenge to the statute. *Oregon & C.R.R.* v. *United States*, 248 U.S. 549, 556-560 (1917). The value to which the railroad was entitled for the revested lands was determined in an accounting suit between the United States and the railroad as authorized by the Revestment Act. *United States* v. *Oregon & C.R.R.*, 8 F.2d 645 (D. Ore. 1925).

O&C counties; 25 percent to the State of Oregon; 40 percent to the reclamation fund in the United States Treasury (see Reclamation Act of 1902, ch. 1093, Section 1, 32 Stat. 388, 43 U.S.C. 391); and 10 percent to the general fund in the United States Treasury (Pet. App. 26).

Between 1916 and 1926 little revenue was derived from the O&C lands, and no payments were made to the counties. To assist the counties, Congress passed the Stanfield Act of July 13, 1926, ch. 897, 44 Stat. 915. This Act authorized payment from the Treasury of an amount equivalent to the taxes which would have accrued against the land from 1916 to 1926 if it had remained in private ownership. The Act further provided that in each year after 1926 an amount equal to taxes was to be paid out of the receipts from the O&C fund. Congress required that whatever annual amounts were paid out in lieu of taxes to the O&C counties from the Treasury would constitute an ever-growing reimbursable charge against the O&C fund. So long as the charge remained outstanding, distributions from the O&C fund in accordance with the formula of the Revestment Act would cease until the O&C fund became large enough to reimburse the tax-equivalent payments made from general federal funds. From 1926 to 1937, however, the receipts from the O&C lands were sufficient to pay only a portion of the tax-equivalent payments to the counties. The payments from the Treasury became an increasingly large reimbursable charge against ~~against~~ the O&C fund (Pet. App. 26-27).

In 1937 Congress enacted the O&C Sustained-Yield Act, ch. 876, 50 Stat. 874 (the "McNary Act"), as amended, 43 U.S.C. 1181a *et seq.* Title I of the McNary Act provided that the lands were to be managed primarily for sustained-yield timber production, for sale of timber, and for grazing under federal lease. Title II of the McNary Act, which is at issue in this case, completely restructured the distribution of O&C fund revenues. Repealing all prior conflicting statutes, Title II directed that the O&C fund's annual revenues be divided into three parts: the first 50 percent, the next 25 percent, and the final 25 percent. The first 50 percent was to go outright to the 18 O&C counties. The next 25 percent was initially to cover the Stanfield Act tax-equivalent payments for taxes accruing up to March 1, 1938. Thereafter, this 25 percent would go to the general fund in the Treasury to satisfy reimbursable charges (such as those created by the Stanfield Act) against the O&C fund. The Act provided that, once these reimbursable charges were paid, this 25 percent segment would be paid annually to the O&C counties in the same manner as the first 50 percent. 43 U.S.C. 1181f(b). Finally, the last 25 percent was "to be available for the administration of [this Act], in such annual amounts as the Congress shall from time to time determine." 43 U.S.C. 1181f(c). Any part of this final 25 percent not used for administration was to go to the general fund in the Treasury to satisfy any outstanding reimbursable charges against the O&C fund. In essence, then, the McNary Act required annual payments to the

O&C counties of 50 percent of O&C revenues and as much as 75 percent of these revenues once the reimbursable charges against the O&C fund were paid off.

Not until 1951 did the O&C counties become eligible for the 75 percent share, for it was not until then that all reimbursable charges had been repaid (Pet. App. 28). Faced with the prospect that the full 75 percent might go to the counties, and concerned that the 75 percent share was overly generous, Congress reviewed the distribution scheme. Eventually, a legislative compromise was arrived at under which all sums appropriated for access roads on O&C lands were made reimbursable charges against the O&C fund within the meaning of 43 U.S.C. 1181f(b). Interior Department Appropriation Act of 1953, ch. 597, 66 Stat. 445, 447; see S. Rep. No. 1803, 82d Cong., 2d Sess. 4 (1952).

Since 1953, a virtually identical proviso has been included annually in every Interior Department appriations act, stating that all sums appropriated for "management, protection, and development of resources and for construction, operation, and maintenance of access roads, reforestation, and other improvements" on O&C lands shall be considered reimbursable charges against the O&C fund. See, *e.g.*, Title I of the Department of the Interior and Related Agencies Appropriations Act for the Fiscal Year Ending September 30, 1979, Pub. L. No. 95-465, 92 Stat. 1279-1280; see also Pet. App. 30, 31 n.2. Prior to 1960, Congress appropriated a specific dollar amount for these purposes; since 1960, it has appropriated an

amount equal to 25 percent of the O&C fund revenues for these purposes (Pet. App. 30).

The effect of such provisos in the appropriations acts has been to amend the 1937 McNary Act annually. Under this amendment, the 18 O&C counties continue to receive the first 50 percent of O&C fund revenues each fiscal year. The next 25 percent, which the counties would otherwise receive under the 1937 statute, is applied to reimburse the Treasury for access roads and other improvements on O&C lands. It is this arrangement that petitioners challenge in the present case.

Petitioners, the county commissioners of Clackamas County, Oregon (one of the 18 O&C counties), brought this action in the United States District Court for the District of Oregon against the respondent Secretaries of the Interior and of the Treasury. Petitioners claimed that the O&C counties were entitled to the entire "next 25 percent" of O&C fund revenues in addition to the first 50 percent.[8] They further alleged that respondents had improperly withheld approximately $182,000,000 due to the counties under the McNary Act. They sought a writ of mandamus compelling respondents to pay over that amount and an injunction directing them to distribute

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[8] An earlier suit seeking the same relief had been brought by several Clackamas County taxpayers. Their suit was dismissed because, as taxpayers, they were not real parties in interest under Rule 17(a), Fed. R. Civ. P. *Jones* v. *Schultz*, No. 73-2790 (9th Cir. July 23, 1974), cert. denied, 420 U.S. 912 (1975).

the full 75 percent of all future O&C fund revenues to the counties.

The district court dismissed the action (Pet. App. 34). The court of appeals affirmed (Pet. App. 24-32). It held that respondents had properly interpreted the provisos in the annual appropriations acts as requiring that the O&C counties' share of the revenues be reduced from 75 percent to 50 percent and that the amendments themselves were valid.

ARGUMENT

The decision of the court of appeals is correct and does not warrant further review.

1. Petitioners contend (Pet. 19) that the O&C counties are entitled to annual distributions equivalent to 75 percent of the O&C fund revenues rather than the 50 percent they have been receiving. Although we agree that under the McNary Act, 50 Stat. 874, 43 U.S.C. 1181a *et seq.*, as enacted in 1937, the O&C counties would have been entitled to 75 percent shares for every year since fiscal year 1953, Congress has prohibited that result by enacting a proviso in every Interior Department appropraitions act since 1953. The effect of the proviso is that the "next 25 percent" of O&C fund revenues, instead of going to the O&C counties, is plowed back into the O&C lands in the form of access roads, reforestation, and other improvements. Congress has thus decided that the O&C counties are to receive 50 percent of the annual

revenues, not 75 percent; the 25 percent share that the counties do not receive directly is allocated to maintaining and improving the O&C lands.

Petitioners argue (Pet. 12-14) that the costs of maintaining and improving the O&C lands should be borne by the second 25 percent of the revenues, which was originally earmarked by Congress for the reimbursement of administrative expenses in connection with the O&C lands. However, the provisos enacted by Congress clearly state that the appropriated amounts are to be considered "reimbursable charges" against the O&C fund in accordance with 43 U.S.C. 1181f(b)—the subsection that deals with the "next 25 percent" of revenues.[4] If Congress had wanted the Treasury to be reimbursed for access road construction and other improvements from the final 25 percent (as opposed to the "next 25 percent"), it would have so provided.

The respondents' interpretation of the statutory language is also supported by the legislative history

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[4] For example, the proviso contained in the Interior Department appropriation act for fiscal year 1979 states (92 Stat. 1280):

> *Provided further,* That the amount appropriated herein is hereby made a reimbursable charge against the Oregon and California land grant fund and shall be reimbursed to the general fund in the Treasury in accordance with the provisions of the second paragraph of subsection (b) of title II of the [McNary] Act of August 28, 1937 (50 Stat. 876).

of the Interior Department appropriations acts.[5] Moreover, in every year since 1953, respondents have distributed O&C fund revenues according to their consistent interpretation of the proviso—that the Treasury is to be reimbursed from the 25 percent share which would otherwise go to the counties. By its successive reenactment of the proviso language with knowledge of this interpretation, Congress has implicitly ratified respondents' construction of the statutory scheme and their method of distribution. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969); *Boesche* v. *Udall*, 373 U.S. 472, 483 (1963).

2. Petitioners maintain that Congress cannot use subsequent appropriations acts to amend the provisions of the McNary Act. However, Title II of the McNary Act is itself an appropriations act. This was the understanding in 1938 of the House Appropriations Committee, which regarded the distributions in the McNary Act as "available for expenditure without annual appropriation by Congress." H.R. Rep. No. 1855, 75th Cong., 3d Sess. 6 (1938). Cf. *United States* v. *Hanson*, 167 F. 881, 884-885 (9th Cir. 1909). Congress can, of course, modify or discontinue prior appropriations as it sees fit.

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[5] See, *e.g.*, *Interior Department Appropriations for 1953: Hearings on H.R. 7176 Before a Subcomm. of the Senate Comm. on Appropriations*, 82d Cong., 2d Sess. 1543 (1952); S. Rep. No. 1803, 82d Cong., 2d Sess. 4 (1952); S. Rep. No. 345, 86th Cong., 1st Sess. 5-6 (1959).

Moreover, even if Title II of the McNary Act were not an appropriations act, petitioners' argument would be without merit. It is well established that Congress can amend substantive legislation by appropriations bills, so long as it does so explicitly. *United States* v. *Dickerson*, 310 U.S. 554, 555-556 (1940); *City of Los Angeles* v. *Adams*, 556 F.2d 40, 48-49 (D.C. Cir. 1977); *NLRB* v. *Thompson Products*, 141 F.2d 794, 797-799 (9th Cir. 1944); cf. *TVA* v. *Hill*, 437 U.S. 153, 190 (1978).

3. Petitioners also contend (Pet. 15-16) that Congress was powerless to amend the McNary Act to reduce the share of revenues received by the O&C counties because such an amendment conflicts with this Court's decision in *Oregon & C.R.R.* v. *United States*, 238 U.S. 393 (1915). According to the petitioners, that decision established that absolute title to the O&C lands had vested in the railroad company, and therefore state sovereignty attached and could not be vitiated by a subsequent congressional enactment. Petitioners apparently contend that once Congress granted the lands to the railroad and the lands became subject to taxation by the State of Oregon, Congress could not thereafter reacquire the lands and remove them from the state tax rolls.

These arguments have no merit. In *Oregon & C. R.R.* v. *United States*, *supra*, this Court required only that the United States secure to the railroad the full value of the grant. The Court did not require that Congress dispose of the lands to settlers or compensate the state for the loss of tax revenues. Once the

lands were revested in the United States and the railroad was compensated for the revestment, the O&C lands and their revenues became the exclusive property of the United States. *Clackamas County* v. *McKay*, 226 F.2d 343 (D.C. Cir. 1955). When the United States acquires property by purchase or condemnation, the municipality that loses taxing authority over the property obtains no compensable rights against the United States. *United States* v. *6.321 Acres of Land*, 479 F.2d 404, 406 (1st Cir. 1973). See also *United States* v. *City of Glen Cove*, 322 F. Supp. 149, 155 (E.D.N.Y.), aff'd, 450 F.2d 884 (2d Cir. 1971); cf. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94-95 (1933). Therefore, petitioners have no property interest in the O&C lands or the O&C fund until and unless Congress directs that distributions be made from the fund, and it is for Congress alone to determine how much revenue will be distributed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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